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No. 90

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

90

LIPE HENSLEE, Individually, Now Residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, Petitioner,

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a Resident Citizen of Memphis, Tennessee, Executors of The Estate of William Bate Williams, Respondents.

ANSWER AND BRIEF OF RESPONDENTS TO PETITION FOR CERTIORARI.

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ANSWER AND BRIEF OF RESPONDENTS TO PETITION FOR CERTIORARI.

William Bate Williams died in the City of Memphis on the 22nd day of July, 1943, leaving his entire estate in trust for his mother, and providing that she be paid the sum of $750.00 per month by the executors or trustees. She was not given the entire income of the estate, but a specific amount.

The will further provided that the Executors and Trustees were authorized, if necessary, to encroach upon the corpus of the estate to pay this amount and further were authorized "to use and expend in their discretion

any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother." (R. 12).

The will further provides that upon the death of the testator's mother certain specific bequests were to be paid and the remainder or residuum of the estate was to be paid to four incorporated charities. The executors shortly after the death of the testator accurately estimated the amount due the charities and deducted this amount from the net value of the estate in computing Federal Inheritance Taxes. The Commissioner disallowed this deduction and thereupon the executors paid the amount of the tax and instituted this suit to recover this payment as a refund.

The sole question is whether the ascertained value of the charitable bequests as established by the executors was deductible in computing inheritance taxes under the applicable acts of Congress, Treasury regulations, the decisions of this Court and the facts and circumstances of this case. The amount deducted was the sum of $121,869.20.

The following facts, some of which are set out in the petition and some of which were not, were available, readily ascertainable and in fact actually ascertained by the executors shortly after the death of the testator, and the figures computed were as of his death.

The gross estate was $508,411.00, which was reduced to a net value of $426,899.00, after deducting expenses. The testator's mother was eighty-five years of age, with a life expectancy of three years (she in fact lived just about three years). She had an independent estate of

$100,000.00, which yielded her an income of between $250.00 and $300.00 a month. She had likewise received $16,500.00 as a result of being a creditor of the estate. Furthermore she owned her own home in the City of Memphis and had a summer home at Monteagle, Tennessee. Her mode of living was simple and economical. She never requested any additional amounts from either the executors or the trustees over and above the $750.00 provided for her support and maintenance. Her actual expenditures and living expenses were considerably less than $750.00 per month and she made material savings from this amount paid to her. The next annual income of the estate was considerably more than the $9,000.00 necessary to pay the monthly amount provided for the testator's mother. This fact was easily ascertained at the testator's death and was borne out by subsequent events so that there was on hand excess income of approximately $18,000.00 at the death of the testator's mother. The original complaint thus avers: (R. 6).

> "Your plaintiffs aver that the statement contained in the denial of the claim for refund dated August 14, 1945, to the effect that the funds to be expended for the life beneficiary cannot be reliably determined and that no fixed standard governing the amount of funds for the requirement of the life beneficiary is not correct. On the contrary your plaintiffs now aver that the value of the charitable bequests can and was reliably determined by your plaintiffs and that there is a fixed standard by which this value was ascertained."

Under the terms of the will and the facts and circumstances surrounding the testator and the life beneficiary at his death the Circuit Court of Appeals did not as an absolute matter of law determine that the respondents

could recover. The Court, however, did hold that the cause should be remanded for trial and if there was no more than a bare possibility—that is a possibility so remote as to be negligible, that the charitable bequests would fail or that there would be an invasion of the corpus of the estate, then the respondents would be entitled to recover. Generally speaking the Circuit Court of Appeals held that the facts as heretofore set forth and as alleged in the complaint were more akin to the case of the

Ithaca Trust Co. v. U. S., 279 U.S., 151,

than to the case of

Merchants Bank v. Commissioner, 320 U.S., 256.

The former case establishes the doctrine that a charitable bequest following a life estate with provisions for invading the corpus of the estate is deductible if there is no uncertainty appreciably greater than that general uncertainty that attends human affairs of invading the charitable bequests.

The petition for certiorari at page 2 states the question presented. We submit that this is not the question presented at all. On the contrary the real question presented is whether or not the Circuit Court of Appeals follows the decisions of this Court in laying down the following rule of law:

> "We think that the case requires a trial upon appropriate issues made up by the pleadings. We do not decide that the appellants are entitled to recover, because that question is not before us. If, upon remand and trial the court should determine that appellants have not made out their case by the weight of the evidence, judgment for appellee would

be indicated; but if the court should find that at the time of testator's death there was nothing more than a bare possibility, i. e., a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow. Commissioner v. Upjohn's Estate, 124 Fed. (2d), 73, 76 (C. A. A. 6); Commissioner v. F. G. Bonfils Trust, 115 Fed. (2d) 788, 793 (C. C. A. 10); Commissioner v. Robertson's Estate, 141 Fed. (2d) 855, 858 (C. C. A. 4). The Robertson case cited and discussed the Merchants Bank case."

Furthermore the petition for certiorari at page 6 under the heading "Specification of Errors to be Urged" undertakes to state what the Circuit Court of Appeals held. This statement is not correct as the Circuit Court of Appeals did no hold what the petition for certiorari at this point says. The Specification of Error says that the trust was admittedly subject to unlimited invasion for the benefit of the life beneficiary and further that the bequest was deductible if the prospect of invasion of the charitable bequest was "remote". These statements are incorrect because the right to invade the estate was not unlimited and uncontrolled, but definitely vested in the discretion of the executors and trustees. This discretion as a matter of law must be, exercised fairly, honestly and in good faith, as we will point out later in this brief. Therefore, the Specification of Errors is not a correct statement of what the Circuit Court of Appeals held or of the question involved in the petition. There is only one question really involved in this petition and that is whether the opinion of the Circuit Court of Appeals correctly sets forth the proper rule of law to be followed in the trial of this case. The ground presented by the petition seeking a certiorari are that the opinion of the

Circuit Court of Appeals is contrary to one decision of this Court and is in conflict with the decisions of several other Circuit Courts of Appeals.

The answer to this entire proposition is that the certiorari should be denied because the opinion and ruling of the Circuit Court of Appeals is in exact accord with the principles of law laid down by this Court. A certiorari will not be granted to correct any finding of facts, but only if the rules of law laid down by the Circuit Court of Appeals are contrary to the decisions of this Court or are in conflict with the decisions of other Circuit Courts of Appeal.

The petition only mentions one case from this Court, towit: Merchants Bank v. Commissioner, Supra, and then states that the Circuit Court of Appeals ignored this decision while professing to be bound by it. The petition very carefully omits any mention of the case of Ithaca Trust Co. v. Commissioner Supra.

It was urged in the Circuit Court of Appeals by the respondents in this case that the principles of law in the Merchants Bank case and the Ithaca case are substantially the same. The law as laid down by these cases is simply that where facts are readily ascertainable at the testator's death which show that there is no possibility or uncertainty appreciably greater than the general uncertainty that attends human affairs of invading the corpus of an estate for the benefit of the life tenant then the remainder over to charities is deductible. This is the language of the Ithaca case. The language of the Merchants Bank case is that the charitable bequests are deductible where there is a highly reliable appraisal of the amount the charity will receive and then goes on to say:

> "Only where the conditions which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from charity and the present value of the bequest become adequately measurable."

The whole intent of Congress was to encourage charitable bequests and for this reason it provided that such bequests should be deducted.

Treasury Regulation 105 Sec. 81.44 carries the intent of Congress into effect by providing that the beneficial interest to charities is deductible where it is "presently ascertainable." When we examine the opinions of the two Supreme Court cases and the opinion of the Circuit Court of Appeals it is readily ascertainable that there is no conflict at all. The Merchants Bank case and the Ithaca case in substance lay down the same principle of law as was followed by the Circuit Court of Appeals in its opinion.

The executors in this case could readily ascertain and did ascertain the facts surrounding the estate and the testator's mother at his death and these facts show beyond a doubt that there was no possibility of invading the corpus of this estate. The statement in the petition that the opinion held that the deduction could be made if the prospect of the invasion of the charitable bequest was "remote" is not correct. The Circuit Court of Appeals did not hold this. A mere reading of the opinion is a complete answer to this incorrect statement. The question presented here is not identical with that presented in the Merchants Bank case at all. The will is not the same nor are the facts surrounding the testator and the life beneficiary the same.

The statement that the certiorari should be granted because the Circuit Court of Appeals has not followed the decision of this case and thereby laid down a precedent that will prevent an orderly enforcement of the tax law is not correct. The only question involved here is whether the Circuit Court of Appeals was correct in remanding this case for a trial and laying down the correct principle of law to be followed at such trial. It is no ground for a certiorari that this Court should pass on factual matters or construction of wills, or even on the question of the right of a trustee to invade the corpus of an estate. This Court is not concerned with these matters, but is only concerned with correct rules of law to be followed in allowing such charitable deductions.

The opinion of the Circuit Court of Appeals quotes from the Merchants Bank case and cites the Ithaca case and lays down a rule that is in conformity with these two cases.

The petition makes the very broad statement that the trustees have the unrestrained power to invade the corpus of this estate. This is not a correct statement of law or of fact. The trustees hold the estate for the benefit of the life beneficiary and the ultimate beneficiaries or remaindermen. They do not have an uncontrollable right to invade the estate and the facts as alleged in the original complaint show this plainly.

Trustees are required to exercise care, diligence and skill in the handling of a trust estate.

Perry on Trusts, 7th Ed. Sec. 511,
54 *American Jurisprudence*, p. 255, Sec. 321.

This rule particularly applies where there are successive beneficiaries, such as a life estate and other beneficiaries as remaindermen.

American Law Institute, Restatement of Law on Law on Trusts, Sec. 232,
Rhode Island Trust Company v. Tucker, 52 R. I. 277, 160 Atlantic 465, 83 A.L.R. 1253-1259,
Adams v. Cowen, 177 U.S. 471, 44 Law Ed. 851.

See particularly
Perry on Trusts, Sec. 539.

These authorities plainly show that the trustees did not have the uncontrolled right to invade the corpus of the trust.

The case of
Commissioner v. Robertson's Estate, 141 Fed. (2d) 855.
is very similar in facts to the case at bar and the Circuit Court of Appeals for the Fourth Circuit in this case discusses the Merchants Bank case and the Ithaca Trust Company case and then lays down the doctrine substantially as contained in the decision of the instant case by the Sixth Circuit. We call the Court's special attention to this case, not because of the facts at issue but because of the clear reasoning of the Court with reference to the two decisions of this Court on this subject. We further make the statement that the decision in the instant case is not in conflict with decisions of other Circuit Courts of Appeals.

The case of
Industrial Trust Company v. the Commissioner, 151 Fed. (2d) 592.
presents substantially the same law as laid down in the

instant case. At the end of the decision the Court cites several cases from the Circuit Courts of Appeals and then says that these cases presented different factual situations from the one before them and that is true as to this case. The will in that case gave the executors and trustees wide discretion to be exercised by them "in their sole and uncontrolled discretion and with liberality." Likewise, the situation of the beneficiaries was quite different. This situation does not exist in this case.

The case of

Decastro's Estate v. Commissioner, 155 Fed. (2d) 254.

likewise presents a different factual issue. The will in that case gave specific directions to the trustees and provided that no one should call in question the discretion of the trustees. Also, the facts and circumstances surrounding the life beneficiary and the income are not at all comparable to the instant case.

In the case of

Newton Trust Company v. Commissioner, 160 Fed. (2d) 175.

the whole situation was complicated, there were several parties involved and the same rule of law was applied in this case as laid down by the Circuit Court of Appeals in the instant case. The factual issue, however, was so entirely different, and the case is so complicated, that we submit it is not an authority that can be construed to be in conflict with the opinion of the instant case.

It is manifest that where there are different types of wills, different estates and beneficiaries of different ages with different modes of life that it may be difficult to determine the present value of a charitable bequest fol-

lowing a life estate. As long as this condition exists there will be of necessity litigation with reference to wills and estates. The ordinary administration of the tax laws has nothing to do with such litigation. Congress has authorized the deductions of charitable bequests, and, when the value of these bequests are readily ascertainable and actually ascertained by competent executors and the and the facts show that the possibility of an invasion of such bequests is nil, then we submit that the bequests should be deducted because this carries out the true intent of Congress.

We, therefore, submit that a petition for certiorari is not granted to establish uniformity and stability in the administration of revenue statutes. These matters are controlled and regulated by Congress and the Treasury Regulations.

The only question here involved is whether the Circuit Court of Appeals has followed the decisions of this Court and has in reality carried out the real intent of Congress when authorizing these deductions.

In the final analysis this Court simply enforces the intent of Congress and the Circuit Court of Appeals in its opinion states that they are better satisfied with the results arrived at because it tends to support Congressional policy toward the charitable bequests.

We respectfully submit that the petition for certiorari should be denied.

Respectfull submitted
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